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No. 96-1762

In the Supreme Court of the United States

OCTOBER TERM, 1996

WASHINGTON RESTAURANT MANAGEMENT, INC.,
Petitioner,
v.
THE VONS COMPANIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION

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RULE 29.1 LISTING

Respondent The Vons Companies, Inc. is a wholly-owned subsidiary of Safeway Southern California, Inc., which in turn is a wholly-owned subsidiary of Safeway Inc. The shares of Safeway Inc. are publicly traded. Vons has no subsidiaries that are not wholly-owned.

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BRIEF IN OPPOSITION

Respondent The Vons Companies, Inc. respectfully prays that the Court deny the petition for a writ of certiorari filed by Washington Restaurant Management, Inc.

STATEMENT OF THE CASE

This case arises from an outbreak of illnesses among customers of Jack In The Box restaurants in several western states, including Washington and California. The customers became ill after eating undercooked hamburger patties containing *Escherichia coli* O157:H7, a pathogenic bacteria that occurs naturally in raw beef but is killed with proper cooking.

Foodmaker, Inc. is a California-based corporation that manages the Jack In The Box restaurant chain through its corporate headquarters in San Diego, California. Petitioner

Washington Restaurant Management, Inc. ("WRMI") owned and operated Jack In The Box outlets in the State of Washington pursuant to a detailed franchise agreement with Foodmaker. WRMI was among the Jack In The Box franchisees whose restaurants were implicated in the outbreak. Respondent The Vons Companies, Inc. became involved in the Jack In The Box litigation because it processed the hamburger patties from raw meat delivered by upstream suppliers.

The present action began in mid-1993, when eighty-five Jack In The Box franchisees from California and elsewhere (not including petitioner WRMI or any other franchisee that was implicated in the outbreak) sued Foodmaker, Vons, and several suppliers of raw beef in the California Superior Court, seeking damages for loss of business caused by the adverse publicity surrounding the outbreak. Foodmaker cross-complained against Vons, based upon Vons' role in processing the hamburger patties.

Vons then filed a cross-complaint against Foodmaker and the Jack In The Box franchisees that had been identified with specific reported illnesses. Among the cross-defendants were petitioner WRMI and Seabest Foods, Inc. (Seabest was a party to the proceedings below but did not file a petition for certiorari.) Vons alleged that the standard cooking procedures required by Foodmaker's franchise agreement were inadequate to ensure that hamburger patties would be properly cooked and thus safe for human consumption. Vons also alleged that the equipment and training procedures mandated by Foodmaker's franchise agreement were below industry standard, with the result that petitioner and other Jack In The Box franchisees did not properly cook the hamburger products and customers consequently were placed at risk of illness. Vons claimed damages for indemnity, as well as lost profits resulting from negative publicity caused by the outbreak.

The Superior Court granted WRMI's motion to quash service of Vons' cross-complaint for lack of personal jurisdiction, and the California Court of Appeal affirmed. *See Vons Companies, Inc. v. Seabest Foods, Inc.*, 37 Cal. App. 4th 1090 (1995). The Supreme Court of California then granted Vons' petition for review.

The California Supreme Court reversed the judgment of the Court of Appeal, holding that the Due Process Clause of the Fourteenth Amendment did not prohibit California from exercising personal jurisdiction over WRMI. The court rested its decision primarily upon this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which the court concluded "largely governs the outcome here." Pet. App. 14a. The court found that the Jack In The Box franchisees here, like the franchisee in *Burger King*, had "reached out beyond" their state of residence and "purposefully availed themselves of benefits in the forum by reaching out to forum residents to create an ongoing franchise relationship." Pet. App. 14a-15a.

The California Supreme Court's analysis turned upon a detailed comparison between the franchise agreement at issue here and the contract terms considered by this Court in *Burger King*. As in *Burger King*, petitioner affiliated itself with a business with headquarters in the forum state, knowing "that [its] operations would be supervised by that headquarters." Pet. App. 15a. The court cited this Court's reasoning that "'[i]n light of [the franchisee's] voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortui-

tous," or "attenuated." ' " *Id.* at 15a-16a (quoting *Burger King*, 471 U.S. at 480).[1]

The California Supreme Court found that WRMI and Seabest, "like the defendants in *Burger King*," had "purposefully availed themselves of benefits in the forum by reaching out to forum residents to create an ongoing franchise relationship." Pet. App. 14a. "As in Burger King, the franchisees here reached out to the California Foodmaker business, and clearly sought out and benefited from the California business's multi-state name-recognition and organization," including "the standardization provided for under the franchise agreement." *Id.* at 16a, 27a-28a. The court noted that Seabest and WRMI "purposefully undertook ongoing contractual obligations to the California business," and made "substantial and continuing purchases from Foodmaker in California." *Id.* at 16a. Among other things, WRMI and Seabest were required by the franchise agreement to use only equipment approved by Foodmaker, to adopt the uniform food preparation standards designed by Foodmaker, to purchase its hamburger meat through Foodmaker, and to allow Foodmaker to inspect its restaurants on a regular basis to ensure compliance. *Id.* at 4a-6a, 25a. As noted below, Vons' claims arose directly from these provisions of the franchise agreement.

The California Supreme Court concluded, based on *Burger King*, that if Foodmaker had sued Seabest and WRMI in California in a breach of contract action based on the franchise agreements, California clearly would have had

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[1] In its petition, WRMI suggests that the California Supreme Court's finding of jurisdiction was based upon sporadic contacts with California. Pet. 4. That is not the case, as is evident from the court's extensive discussion of the franchise relationship between Foodmaker and its franchisees, pursuant to which the franchisees, including WRMI, submitted to detailed and extensive regulation from the State of California of their franchise operation.

jurisdiction over the action (Pet. App. 16a) — a proposition that WRMI does not dispute here and did not dispute below. Likewise, the court noted that if Foodmaker were to seek indemnity from the franchisees based upon a violation of the franchise agreement, jurisdiction would be readily established. *Id.* at 16a-17a. Thus, the only remaining question was whether it made a difference that a "third party" such as Vons, rather than Foodmaker, was the plaintiff bringing the suit against the franchisees. *Id.* at 17a.

The California Supreme Court held that it did not. Pet. App. 17a. Because it was Seabest and WRMI themselves — and not Vons or any other third party — that purposefully established extensive contacts with the forum state, it could not be said that requiring them to answer Vons' claim in that state would be "to allow a third party unilaterally to draw them into a connection with the state." *Id.* Likewise, because Seabest and WRMI "had an ongoing commercial relationship" with California, the exercise of jurisdiction over them would not "depend on 'random, fortuitous or attenuated' contacts." *Id.*

The court further explained that, under precedent of this Court and the lower courts, "the defendant's forum activities need not be directed at the *plaintiff* in order to give rise to specific jurisdiction." *Id.* at 26a (emphasis in original). Rather, this Court's decisions all have emphasized the relationship among "the defendant, *the forum*, and the litigation — not between the plaintiff and the defendant." *Id.* at 27a (emphasis in original). In each of this Court's cases in this area, the court noted, "the relevant contacts are said to be with the *forum,* because it is the defendant's choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction." *Id.* (emphasis in original; citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion); *Burger King*, 471 U.S. at 475, 479; *Helicopteros Nacionales de Colombia*

v. Hall, 466 U.S. 408, 414 (1984); and *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The court relied upon *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), where this Court held that a publisher could be held accountable in New Hampshire for defamatory publications there, even though the plaintiff had no relationship with New Hampshire. The court also cited decisions of the Seventh Circuit and the Federal Circuit holding that it is the defendant's relationship with the *forum*, and not with the particular *plaintiff* bringing the action, that drives the personal jurisdiction analysis. Pet. App. 26a-27a (citing *Akro Corp. v. Luker*, 45 F.3d 1541 (Fed. Cir. 1995) and *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909 (7th Cir. 1983)).

The court also rejected petitioner's argument that there was not a sufficient connection between Vons' claims and petitioner's contacts with California. The court looked to its earlier precedent holding that there must be a "substantial connection" between the action and the defendant's forum-based contacts, and also looked to this Court's stated requirement that the action be " 'related to or "arise[ ] out of" a defendant's contacts with the forum.' " Pet. App. 20a (citing *Helicopteros*, 466 U.S. at 414 and *Burger King*, 471 U.S. at 472). The court also noted that its formulation of the test was consistent with the decisions of the Sixth Circuit in *Third National Bank v. WEDGE Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989); the Seventh Circuit in *Amoco Cadiz*, 699 F.2d at 917; the Eighth Circuit in *Northrup King Co. v. Compania Productora Semillas*, 51 F.3d 1383, 1388 (8th Cir. 1995); the Eleventh Circuit in *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994) and *Vermeulen v. Renault, U.S.A. Inc.*, 985 F.2d 1534, 1546 (11th Cir. 1992); and the Federal Circuit in *Akro Corp. v. Luker*, 45 F.3d at 1547. The court concluded that, under the standard established by these cases, "Vons has demonstrated a substantial nexus between WRMI's and

Seabest's business contacts in California and Vons' tort claims against WRMI and Seabest." Pet. App. at 24a.

The California Supreme Court explained that the terms of the franchise contract between WRMI and Foodmaker were at the heart of Vons' claims against WRMI, thereby creating a "substantial connection" between WRMI's contacts with the forum and Vons' claims. Pet. App. 18a-20a. The court noted that petitioner's contacts with the forum "bore a substantial relationship to the claimed injury to Vons's business and reputation" because Foodmaker's franchise agreement required petitioner to purchase the hamburger patties from Foodmaker and to prepare them "according to the standards provided under the franchise agreement." *Id.* at 28a.[2] "Vons' cross-complaint alleged that the franchisees failed to cook the meat properly because of deficiencies in the cooking and training procedures and equipment requirements provided for by Foodmaker on a systemwide basis." *Id.* The court concluded that Vons' claims were substantially related to petitioner's contacts with California, including its voluntary submission to an ongoing and extensive contractual relationship with Foodmaker:

> The franchise relationship, with its uniform standards for cooking food, training employees, and buying equipment, itself was a source of injury to Vons. . . . Accordingly, both the negligence claims and the claim for indemnification arose out of the contractual relationship between Foodmaker, WRMI and Seabest, a relationship that had a substantial connection to California. Pet. App. 24a-25a.

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[2]Petitioner erroneously states that it purchased the hamburger meat from "distributors and suppliers in the State of Washington." Pet. 4. In fact, as the California Supreme Court correctly noted, petitioner purchased the hamburger patties from Foodmaker.

The court also found significant the terms of Foodmaker's franchise agreement stating that in any dispute regarding the franchise agreement, the parties would be bound *both* by California law *and* by provisions establishing California courts as the venue for any such dispute. Pet. App. 16a. Given these provisions, the court observed, "it was not only predictable that [the franchisees] might face litigation in California — it was *settled* that any litigation on the contract would occur in this forum." *Id.*

In determining the standard that should apply to assess the relationship between the defendant's contacts with the forum and the plaintiff's cause of action, the California Supreme Court rejected two prior decisions of the California appellate court, which had applied a "proximate cause" test that formed the basis for the California Court of Appeal's decision below. Pet. App. at 31a-33a. The California Supreme Court held that the "proximate cause" analysis used in these cases was inconsistent with this Court's formulation in *Burger King* and *Helicopteros,* which "states in the disjunctive that jurisdiction is proper when litigation results from alleged injuries that 'arise out of or relate to' forum activities." *Id.* at 33a (citing *Burger King,* 471 U.S. at 472; *Helicopteros,* 466 U.S. at 414, n.9; and *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). The court also reasoned that a "proximate cause" test would inappropriately prohibit jurisdiction in most contract actions arising out of ongoing interstate relations — because in most such cases, as in *Burger King* itself, it cannot be said that the contractual relationship with the forum *caused* a party to fail to honor the terms of the contract. Pet. App. 34a. Accordingly, the court rejected the suggestion of the lower California courts that a "proximate cause" test should govern the personal jurisdiction analysis. *Id.* at 34a-36a. The court did not point to any federal circuit that had applied a "proximate cause" test.

The California Supreme Court did note that two federal circuits have articulated a broad "but for" test for determining whether an exercise of specific jurisdiction is sufficiently related to a defendant's forum-based contacts. Specifically, the court cited the Ninth Circuit's decision in *Shute v. Carnival Cruise Lines,* 897 F.2d 377 (9th Cir. 1990), *reversed on other grounds,* 499 U.S. 585 (1991), as well as a footnote in the Fifth Circuit's opinion in *Prejean v. Sonatrach, Inc.,* 652 F.2d 1260, 1270 n.21 (5th Cir. 1981) — both of which set forth a broad "but for" test for determining whether a claim is sufficiently related to a defendant's contacts with the forum. Pet. App. 38a-39a. The California Supreme Court rejected the "but for" test advanced in these cases, concluding that the importation of tort-based causation standards that focus on physical factors — such as the "but for" test — are not useful in analyzing "the social activities that are part of the causal chain in typical personal jurisdiction disputes." Pet. App. 40a. The court reasoned that "contacts in personal jurisdiction cases are generally social acts, like advertising directed at forum residents." *Id.* at 41a. The court concluded that analyzing these issues under a *relational* test, rather than a *causal* test, is more consistent both with the concerns underlying personal jurisdiction questions, and with this Court's precedents speaking "of a *relationship* between the cause of action and the contacts in the forum," and using "relatively broad terms to describe the necessary relationship." *Id.* (citing *International Shoe*, 326 U.S. at 319; *Burger King*, 471 U.S. at 472; and *Helicopteros*, 466 U.S. at 414, n.9).

Finally, the court rejected Seabest's invitation to adopt a "substantive relevance" test, which would look to whether acts forming each essential element of the plaintiff's substantive cause of action occurred in the forum. Pet. App. 43a-52a. The court found that this test — which has been advanced by one legal commentator in the area but not

adopted by any court[3] — focused unduly on the particularized elements of each cause of action under state law, and was inconsistent with this Court's cases establishing a relational test and making clear that jurisdiction need not be based solely upon a defendant's activities within the physical boundaries of the forum state. *Id.* at 49a-50a.

REASONS FOR DENYING THE WRIT

Nothing in the California Supreme Court's carefully reasoned decision warrants review by this Court. As that court recognized, this Court's decision in *Burger King* largely controls the personal jurisdiction analysis in this case. To the limited extent that *Burger King* is not directly controlling — *i.e.*, to the extent that the claims against WRMI are asserted by Vons, rather than by the franchisor itself — the California Supreme Court correctly held that the proper focus is on the relationship between the defendant and the *forum*, not on the relationship between the defendant and the *plaintiff*. Because there is no split on this issue and the point was correctly decided, it is not worthy of this Court's review.

The only other issue identified by petitioner is the proper standard to be applied in determining whether an action "arises out of or relates to" a defendant's forum-based contacts so as to warrant application of the *International Shoe* "minimum contacts" analysis — rather than the general jurisdiction standard that must be met when an action does not relate to the defendant's forum contacts. *See generally Helicopteros*, 466 U.S. at 414-15. For three rea-

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[3] The court soundly rejected Seabest's argument that this test "now represents the majority view in the federal circuits." Pet. App. 44a.

sons, this issue does not warrant granting the petition in this case.

First, petitioner dramatically overstates the degree to which confusion continues to exist in the lower courts on this issue. Despite petitioner's contention that there is a split between courts applying a "proximate cause" test and those applying a different standard, there is *no* federal circuit that continues to apply the "proximate cause" standard. Of the three circuits to which petitioner attributes this test, one of those courts — the First Circuit — has explicitly abandoned any strict "proximate cause" test, and the two other cases that petitioner cites — decisions of the Second and Eighth Circuits — have been construed as merely interpreting the state long-arm statutes rather than establishing a constitutional standard. More recent decisions of the Second and Eighth Circuits apply a relational standard much like that applied by the California Supreme Court here.

Second, the issue is not squarely presented in this case because, under any of the standards discussed by the California Supreme Court, the result would be the same. As the court explained, the extensive and detailed provisions of the franchise agreement between Foodmaker and petitioner are more than sufficient to establish the requisite contacts with the State of California. It is these contacts that form the basis for Vons' claims, which are based upon the allegation that the procedures, equipment, and training mandated by Foodmaker's standard franchise agreement were insufficient to ensure proper cooking of the hamburger patties involved in the outbreak. In short, Vons' claims flow directly from the franchise agreement itself — and thus would satisfy both this Court's "arises out of or relates to" test as generally stated (*see Burger King*, 471 U.S. at 472), and any of the variations on that test that have been applied by the lower courts.

Third, petitioner's more general request for "clarification" of this Court's standards for personal jurisdiction is nothing more than an invitation to engage in a fact-bound inquiry into whether petitioner's extensive contacts with California through its franchise agreements with Foodmaker are sufficiently related to Vons' claims to warrant the exercise of personal jurisdiction — as is evident from fact-specific nature of the "Question Presented for Review" in the petition. This Court has frequently and clearly stated the relatedness requirement in its previous cases. *See, e.g., International Shoe*, 326 U.S. at 319-20 (minimum contacts analysis is appropriate where the claims "arose out of or are connected with" the defendant's contacts with the forum state); *Helicopteros*, 466 U.S. at 414 and n.9. Most recently, in *Burger King*, the Court again discussed the "relatedness" requirement, restating the standard as whether the plaintiff's claims "arise from or relate to" the defendant's forum contacts. As long as the defendant's forum activities satisfy this broad standard and constitute "minimum contacts" with the forum, the Court is assured that the fairness and predictability concerns of the Due Process Clause have been met. Moreover, because this Court's test is inevitably fact-specific, it is unlikely that any one case will definitively settle the law in this area. *See Burger King*, 471 U.S. at 485-86 (noting that "the facts of each case must be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice").

In sum, whatever confusion may have existed among the lower courts as to when an action "arises out of or relates to" a defendant's forum-based contacts largely has been alleviated by recent cases, including the decision below, rejecting tort-based analogies and focusing instead on the relationship between the defendant and the forum. Given the growing consensus on this issue, this Court should await further developments in the lower courts. At the very least, the Court should await a case in which resolution of the issue

will determine the outcome, such as cases in which a fortuitous contact with the forum is a "but for" cause of an injury in a distant state but might not meet more stringent relational standards for specific jurisdiction. *See, e.g., Shute*, 897 F.2d 377 (jurisdiction upheld where plaintiff's purchase of travel tickets in the state of Washington were held to be the "but for" cause of a slip-and-fall injury in international waters on a cruise ship that departed from Florida).

A. The Decision Below Rests Upon A Straightforward Application Of This Court's Decision In *Burger King Corp. v. Rudzewicz* And Does Not Merit This Court's Review

As the California Supreme Court recognized, the personal jurisdiction issue in this case was largely determined by this Court's analysis in *Burger King*. In *Burger King*, this Court found that the Michigan franchisee's extensive contacts with the State of Florida through his closely regulated contractual relationship were more than sufficient to comport with applicable due process standards — even though the franchisee had never physically set foot in Florida. The Court reasoned that "where the defendant . . . has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there . . . [B]ecause his activities are shielded by 'the benefits and protections' of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at 475-76 (citations omitted).

This Court concluded that the defendant's franchise agreement with Burger King constituted "a *substantial* connection" with the State of Florida. *Id.*, at 479 (emphasis in original). "Eschewing the option of operating an independent local enterprise, [the defendant] deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term

franchise and the manifold benefits that would derive from affiliation with a nationwide organization." *Id.* at 479-80. "[H]e entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida." *Id.* at 480. "In light of [the defendant's] voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the 'quality and nature' of his relationship to the company in Florida can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' " *Id.*

This case is virtually indistinguishable from *Burger King*. As in *Burger King*, the California Supreme Court held that petitioner had subjected itself to jurisdiction in the California courts when it contracted for the significant benefits associated with an affiliation with a national fast food chain and, in return, submitted to extensive regulation of its activities through the franchise agreement. Pet. App. 16a-18a, 39a-30a. The agreement that petitioner entered into with Foodmaker was nearly identical to those in *Burger King*, including the strong emphasis on uniformity of all aspects of the operation of restaurants within the Jack In The Box "System." *Id.* at 4a, 16a-17a, 27a-28a. Foodmaker franchisees, including petitioner, were required to submit to exacting regulation of every aspect of their operations, including "uniform standards for cooking food, training employees, and buying equipment." *Id.* at 25a-26a. *Compare also* JA II 629[4] (franchise agreement requiring franchisee to submit to uniform standards for "restaurant designs and color scheme, signage, interior decor, equipment systems, product and supplies, specifications, menu formats and service methods and procedures") *with Burger King*, 471 U.S. at 464, n.1 (mandating uniform "restaurant format and operating system, including a recognized design, decor,

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[4]References to "JA" are to the Joint Appendix, Volumes I and II, in the record before the California Court of Appeal.

color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered"). As in *Burger King*, the parties acknowledged that these standards were "necessary and essential to the image and success of each Jack In The Box restaurant and the [Jack In The Box] system [as a whole]." JA II 629 (franchise agreement).

Like the franchisee in *Burger King*, petitioner " 'reached out beyond' " its state of residence and negotiated with a California corporation "for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation" with a multistate organization. *Burger King*, 471 U.S. at 479-80. It entered into a carefully structured long-term relationship that "envisioned continuing and wide-reaching contacts" with Foodmaker in California. *Id.* at 480. Finally, it voluntarily accepted "the long-term and exacting regulation" of its business from Foodmaker's San Diego headquarters. *Id.* As the California Supreme Court noted, WRMI's contacts with California "can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' " Pet. App. at 15a-16a (quoting *Burger King*, 471 U.S. at 480).

Indeed, petitioner had more extensive ties with California than the individual franchisee in *Burger King*, who had "no physical ties to Florida" other than his partner's attendance at a brief training course. *Id.* at 479. Petitioner had significant physical contacts with California, including attendance at training sessions at Foodmaker facilities in California, trips by its principals to California in connection with the franchise relationship, and the negotiation and partial execution of the franchise agreements in California. Pet. App. 5a-6a. Because the *Burger King* defendant's very limited contacts were enough to constitute "purposeful availment" of the benefits and protections of the forum, it follows that WRMI's more extensive contacts meet that standard.

This Court in *Burger King* also emphasized the choice of law provision in Burger King's franchise agreement, which was a significant indication that the franchisee " 'purposefully availed himself of the benefits and protections of Florida's laws' by entering into contracts expressly providing that those laws would govern franchise disputes." *Burger King*, 471 U.S. at 482. Once again, this case is even stronger because petitioner not only availed itself of California's *laws*, but also invoked the protection and jurisdiction of its *courts* in any action — including an action brought by petitioner itself — to enforce the agreements. Pet. App. 4a-5a. As the California Supreme Court noted, this provision clearly indicates that petitioner purposefully availed itself of the benefits of California law. *Id.* at 16a.

The only difference between this case and *Burger King* is that here the plaintiff is not a party to the franchise agreement that gives rise to "minimum contacts" with the forum. As to this issue, the California Supreme Court correctly held that it is the relationship between the defendant and the *forum*, and not the relationship between the defendant and the *plaintiff*, that controls the personal jurisdiction issue. *See* Pet. App. 26a (citing *Asahi*, 480 U.S. at 112 (plurality opinion); *Burger King*, 471 U.S. at 475, 479; *Helicopteros*, 466 U.S. at 414; *Shaffer*, 433 U.S. at 204 and *Keeton*, 465 U.S. at 775. As the court also noted, the federal courts to address this issue — the Seventh Circuit and the Federal Circuit — have reached the same conclusion, holding that it is the defendant's relationship with the *forum*, and not with the particular *plaintiff* bringing the action, that drives the personal jurisdiction analysis. Pet. App. 26a-27a (citing *Akro Corp.*, 45 F.3d at 1547 and *Amoco Cadiz*, 699 F.2d at 917). Because there is no conflict on this issue and the point was correctly decided below, it is not worthy of this Court's review.

B. Petitioner Overstates The Claimed Conflict Among The Lower Courts As To the Standard For Determining Whether A Claim "Arises Out Of Or Relates To" A Defendant's Contacts With The Forum

The petition focuses entirely on a claimed conflict among the federal courts as to the appropriate standard for determining whether a cause of action "arises out of or relates to" the defendant's forum-based contacts. Since *International Shoe*, this Court has held that the Due Process Clause is not offended by a state's exercise of jurisdiction over an out-of-state defendant where the defendant has availed itself of the benefits of the forum state and the obligations that the State seeks to enforce "arise out of or are connected with the activities within the state." 326 U.S. at 319. More recently, this Court has reiterated that the "minimum contacts" analysis of *International Shoe* applies where the plaintiffs' claims "arise out of or relate to" the defendants' contacts with the forum. *Burger King*, 471 U.S. at 472-73; *see also id.* at 474 (where defendant has engaged in activities with respect to the forum, specific jurisdiction is proper "for disputes relating to such activity"); *Helicopteros*, 466 U.S. at 414 (relevant test for application of *International Shoe* is whether "a controversy is related to or 'arises out of' " the defendant's forum-related activities). It is this latter standard, petitioner claims, that has given rise to confusion in the lower courts.

1. Since The Decision In *Shute*, The Lower Courts Have Moved Away From Tort-Based Tests For Personal Jurisdiction, Alleviating the Circuit Split Created By Earlier Decisions

WRMI asserts that a serious conflict exists among the circuit courts over the degree of relatedness required between the defendant's contacts with the forum and the plaintiff's claims in order for the *International Shoe* "minimum contacts" test to apply. Petitioner asserts that the

circuits are split into "two general camps" — one advocating a stringent "proximate cause" standard for relatedness and the other a "broad 'but for' " standard. Pet. 11.

Petitioner's statement might have had some merit in 1990, when this Court granted certiorari in *Carnival Cruise Lines, Inc. v. Shute,* 498 U.S. 807-08 (1990). That case arose from a decision of the Ninth Circuit, in which the Ninth Circuit had noted that the federal courts had reached different conclusions on the issue, some applying a "but for" test and others using a "proximate cause" standard. The Ninth Circuit specifically noted that the choice between these two tests determined the outcome in that case because the plaintiffs' purchase of travel tickets in the forum — a fact that the Ninth Circuit found to be a "but for" cause of their injury on a cruise ship in international waters — would not have been sufficient under a "proximate cause" test. The Ninth Circuit selected the "but for" standard and upheld jurisdiction.

This Court granted certiorari on this question in *Shute, see* 498 U.S. 807-08 (1990), but ultimately decided the case on another ground without reaching the personal jurisdiction issue. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991). The Court noted that "it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Id.* at 589-90 (citation omitted).

Although the tort-based "proximate cause" and "but for" standards may have been a perceived source of circuit conflict in 1990, when this Court granted certiorari in *Shute,* the lower courts more recently have moved away from analyzing the "relatedness" requirement in these terms. The general trend among the federal circuit courts — like the California Supreme Court's decision below — is to look directly to this Court's "arise out of or relates to" test rather than apply tort-based causation standards such as "proxi-

mate cause" or "but for." Indeed, the "proximate cause" standard — one side of the split that Petitioner asks this Court to resolve — has been all but abandoned by the First Circuit, the only federal circuit in which it continued to be the law. *See Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996). Petitioner concedes that *Nowak* represents a retreat from the stringent "proximate cause" standard. Pet. 11.

In *Nowak*, the plaintiff's decedent drowned in the pool of the defendant's Holiday Inn in Hong Kong. Plaintiff's employer was a Massachusetts corporation that had contracted for a minimum number of nights at the Holiday Inn in return for a discounted rate. The defendant kept in regular contact with the Massachusetts corporation as to their rates, and mailed promotional material to Massachusetts.

The First Circuit found that the necessary degree of relatedness between contacts and cause of action had been met, reasoning that "[w]hile the nexus between Tak How's solicitation of [the Massachusetts corporations] business and Mrs. Nowak's death does not constitute a proximate cause relationship, it does represent a meaningful link between Tak How's contact and the harm suffered." *Nowak*, 94 F.2d at 716. The court concluded that this "meaningful link" satisfied due process limits on the court's exercise of personal jurisdiction over the defendants.

The First Circuit in *Nowak* rejected the argument that a line of First Circuit cases, beginning with *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) and including *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256 (1st Cir. 1990) (cited by petitioner here), established "proximate cause" as the applicable federal standard. The court recognized, as it had previously, that these cases rested upon an interpretation of Massachusetts's long-arm statute that since had been rejected by the Massachusetts Supreme Judicial Court. *Nowak*, 94 F.3d at 713 (citations omitted). The court

concluded that a strict "proximate cause" test was *not* appropriate in the constitutional context because it was "unnecessarily restrictive." *Id.* at 715.

Petitioner attempts to resurrect the proximate cause test by erroneously claiming that the Second and Eighth Circuits adhere to this standard. However, the two cases cited for this proposition — *Pearrow v. National Life & Acc. Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983), and *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2nd Cir. 1964) — do not support the point. Both cases were decided before this Court's decisions in *Burger King* and *Helicopteros*, and both have been construed as mere interpretations of the relevant state long-arm statutes, which require a more stringent relationship between the forum contacts and the cause of action. *See, e.g., Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 765 (1983) (construing *Gelfand* as an application of New York's longarm statute); Pet. App. 46a (noting that *Pearrow* has been construed as an interpretation of the state long-arm statute, rather than a constitutional ruling).

Petitioner fails to cite other, more recent decisions of both the Second and the Eighth Circuits assessing the relationship between the defendant's contacts with the forum and the cause of action under a relational standard very similar to the standard applied by the California Supreme Court here. In *Agency Rent A Car System, Inc. v. Grand Rent A Car Corp*, 98 F.3d 25 (2nd Cir. 1996), for example, the Second Circuit relied upon this Court's analysis in *Burger King* to conclude that the defendants were subject to personal jurisdiction in New York:

> As in *Burger King*, licensees have 'deliberately reach[ed] out' beyond their home states for the purpose of 'a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization.' As such, they purposefully availed themselves of the forum and

> shouldhave reasonably foreseen being haled into court here.

98 F.3d at 32 (citing *Burger King*, at 479-80). Significantly, *Gelfand* is no longer cited by any court as authority on the degree of "relatedness" required by the due process clause.

The Eighth Circuit also has changed its standard since its decision in *Pearrow*. In *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816 (8th Cir. 1984), the Eighth Circuit explicitly acknowledged adjusting its "relatedness" standard to comport with recent decisions of this Court. It then applied the "arising out of or related to" standard to find that it had specific jurisdiction over the defendant. *Id.* at 819; *see also Wessel, Arnold & Henderson v. National Med. Waste, Inc.*, 65 F.3d 1427 (8th Cir. 1995). As these cases indicate, the Eighth Circuit has moved toward a relational standard rather than a tort-based causation test to determine the scope of personal jurisdiction.

Most of the lower federal courts have acknowledged that their standards, though differently stated, are similar in application. The Sixth Circuit has stated that although a cause of action need not "formally 'arise from' defendant's contacts with the forum," there must be a "substantial connection" with the defendant's forum activities. *Third National Bank v. WEDGE Group*, 882 F.2d 1087, 1091 (6th Cir. 1989). It has equated its "substantial connection" requirement with the "lies in the wake of" standard employed by the Seventh Circuit in *Amoco Cadiz*, 699 F.2d at 915-16. The Sixth Circuit also has noted that its position is consistent with the Fourth and Eleventh Circuit standards, as well as with this Court's precedents. *Third Nat'l Bank*, 882 F.2d at 1091 ("The law of this circuit . . . is consistent with the Supreme Court's language in *International Shoe* . . . [and] with [the standard applied] by at least two other circuits. *See City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985); *Southwire*

Co v. Trans-World Metals & Co., 735 F.2d 440, 442 (11th Cir. 1984).")

The California Supreme Court similarly noted here that its "substantial connection" standard is consistent with the standards adopted by most federal circuits. Pet. App. 21a-23a. Moreover, the standard applied by the court below and the federal courts discussed above comports with this Court's precedents setting forth the values underlying the Due Process Clause. The "substantial connection" between defendant's forum activities and the cause of action, coupled with the requirement that those activities constitute "minimum contacts" with the forum, ensures that the defendant will be forewarned that his purposeful availment of the forum may subject him to suit there.

The only circuit court that clearly remains separate from the others is the Ninth Circuit, which continues to apply a tort-based "but for" test rather than the relational standard suggested by this Court's decisions and applied by other federal courts. *See Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (reaffirming the "but for" test of *Shute*); *Doe v. American Nat'l Red Cross*, 1197 U.S. App. LEXIS 9650 (May 2, 1997) at *9 (same).[5] Given the near-unanimity with which the other federal courts are reaching consensus, there is a substantial possibility that the Ninth Circuit will follow suit. If it does not, then a case from the Ninth Circuit directly posing the question would be a more appropriate vehicle for resolving the issue.

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[5] Even the Ninth Circuit has qualified its "but for" standard somewhat by noting that the "reasonableness" element of the due process analysis may allow a defendant to defeat personal jurisdiction even where the defendant's activities were purposefully directed at the forum and were the "but for" cause of the plaintiff's injuries, but where exercising jurisdiction under the circumstances would be unreasonable. *Doe*, 1997 U.S. App. LEXIS 9650 at *10.

2. The Legal Question That Petitioner Poses Is Not At Issue In This Case

Even if further guidance by this Court were needed to resolve variations among the "relatedness" standards applied by the lower courts, this case is a poor vehicle for doing so because it does not squarely present the issue. As the California Supreme Court explained here, petitioner's long-term franchise agreement with a California corporation is at the heart of Vons' counterclaim and was a direct and immediate cause — even in a strict tort sense — of Vons' injuries. Petitioner's franchise agreements with Foodmaker, a California corporation, required it to prepare and cook hamburger meat in an unsafe manner, causing injury to Jack In The Box customers. Petitioner's extensive contractual ties with California dictated the very actions that form the substantive basis for Vons' claims. These actions — the inadequate preparation and cooking of hamburger meat — are both the "proximate" and the "but for" cause of the injuries caused by petitioner. As a result, California's assertion of personal jurisdiction in this case simply does not rest upon this Court's selection of a "relatedness" standard.

Even if this Court concludes that guidance is needed at some point to clarify the necessary relationship between the defendant's contacts with the forum and the cause of action, it should await a case that squarely presents the issue. Specifically, the Court should await one of the many cases where a sporadic contact with the forum state is a "but for" cause of an injury in a foreign state, but otherwise bears little relation to the plaintiffs' action or the injury itself.

In *Shute*, for example, the defendant's forum contacts consisted merely of advertising in the forum and distributing brochures to travel agents within the forum. One such travel agent booked passage on defendant's cruise ships for Washington residents. Although the defendant's contacts were extensive enough to constitute the "but for" cause of plain-

tiff's injuries aboard defendant's cruise lines, they were not the proximate cause of those injuries. As the Ninth Circuit itself recognized, its application of a "but for" standard, rather than a "proximate cause" standard, was determinative of that court's finding of jurisdiction.

This case does not frame the relatedness requirement in such sharp relief. Accordingly, rather than granting certiorari in a case that will not require the Court to reach the only question that the petitioner has identified as certworthy, this Court should await a case in which the relatedness standard determines the forum's assertion of personal jurisdiction.

CONCLUSION

In sum, the conflict that petitioner claims exists among the lower federal courts has largely resolved itself. To the extent that further clarification is necessary, this Court should await a case that presents a more appropriate vehicle for resolving the issue. The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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